

JAN 18 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HERBERT A. BATES,

Defendant - Appellant.

No. 06-10464

D.C. No. CR-00-00229-MCE

MEMORANDUM \*

Appeal from the United States District Court  
for the Eastern District of California  
Morrison C. England, District Judge, Presiding

Submitted January 14, 2008 \*\*

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Herbert A. Bates appeals from the district court's decision following limited remand under *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc), that it would not have imposed a materially different sentence had it

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

known that the Guidelines were advisory. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Bates contends that his sentence is improperly multiplicitous, and that his sentence should be rectified on appeal, rather than in a subsequent 28 U.S.C. § 2255 proceeding. We are not persuaded. Under the law of the case doctrine, we decline to reexamine this Court's prior conclusion in *United States v. Smith*, 424 F.3d 992, 999-1003 (9th Cir. 2005), that Bates failed to demonstrate plain error. *See Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).

**AFFIRMED.**